

(2)

No. 90-106

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1990

LOIS MORALES,

Petitioner,

vs.

KANSAS STATE UNIVERSITY and
KANSAS BOARD OF REGENTS,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS

**BRIEF OF RESPONDENTS
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Is a state employee constitutionally entitled to full representation of counsel in an administrative hearing concerning her job performance evaluation when full representation is permitted in subsequent pre-termination and post-termination proceedings arising out of the unsatisfactory performance found in those job evaluations?

2. Where, after a full due process hearing, a state civil service board orders that a terminated employee be granted an opportunity to accept a lower skilled job but does not order back pay, is the failure to order back pay a deprivation of property without constitutional due process?

3. Does the state court's

refusal to consider an issue not raised before an administrative agency constitute an independent and adequate state ground?

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OPINIONS BELOW

In addition to the opinions and judgments contained in the petition for writ certiorari, the Memorandum Decision and Order of the District Court of Shawnee County, Kansas, is appended hereto as Appendix A.

STATUTES AND REGULATIONS INVOLVED

The following state regulations set forth in the petition for certiorari are not involved in this case:

K.A.R. 1-7-12; and
K.A.R. 1-14-8.

The following Kansas statutes are involved in this case:

K.S.A. 77-612. Exhaustion of administrative remedies. A person may file a petition for judicial review under this act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any

other agency authorized to exercise administrative review....

K.S.A. 77-617. Limitations on new issues. A person may obtain judicial review of an issue that was not raised before the agency, only to the extent that:

(a) The agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue;

(b) the agency action subject to judicial review is a rule and regulation and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue;

(c) the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding; or

(d) the interests of justice would be served by judicial resolution of an issue arising from:

(1) A change in controlling law occurring after the agency action; or

(2) agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

K.S.A. 75-2949(b). Prior to dismissal, demotion or suspension of a permanent employee in the

classified service, the appointing authority shall furnish the employee by certified mail to the employee's last known address, return receipt requested, or by personal delivery, a statement in writing specifically setting forth the reasons and factual basis therefor. A copy of such statement shall be furnished immediately to the director. This statement shall contain notice of the proposed dismissal, demotion or suspension and shall specify the proposed effective date thereof. Except as otherwise provided in the Kansas civil service act, a proposed suspension, demotion or dismissal shall become effective no less than three calendar days nor more than 14 calendar days following the date the notice of such proposed suspension, demotion or dismissal is personally delivered to the employee or deposited with the post office as certified mail. If in the opinion of the appointing authority conditions warrant, the appointing authority may relieve the employee of duties or change the duties of the employee during such period. If the employee is relieved from duty during such period, the employee may be continued in pay status, or placed on leave of absence without pay by the appointing authority. In the

statement proposing suspension, demotion or dismissal, the appointing authority shall offer the employee who is proposed to be suspended, demoted or dismissed an opportunity to reply in writing, or appear in person, or both, before the appointing authority or a designated representative of the appointing authority, on the issue of the proposed suspension, demotion or dismissal prior to the time such suspension, demotion or dismissal is specified by the notice to become effective. The statement shall specify the date, time and place by, or at which, the employee may reply in writing or appear, or both. If the employee chooses to appear in person on the issue of the proposed action, the employee may be represented by a person of the employee's choice.

K.S.A. 75-2929e(c). Within ten (10) days after the date of the board's final order, any party aggrieved by the final order of the board may apply for a rehearing in respect to any matter determined therein. Within ten (10) days of the date of filing of an application for rehearing, the application shall be granted or denied or continued, but any such continuance shall not exceed thirty (30) days from the date of

the order of continuance. If the rehearing is not granted or continued within such ten-day period it shall be taken as denied. If a rehearing is granted, the matter shall be determined by the board within thirty (30) days after the rehearing is granted and the rehearing shall be conducted de novo. No appeal shall be taken from any final decision of the board by any party unless such party has made application for a rehearing as provided by this section. An application for rehearing shall set forth specifically the ground or grounds on which the applicant considers all or any portion of the final order or decision to be unlawful or unreasonable. In any subsequent appeal or proceeding in any court, no party shall urge or rely upon any ground not set forth in the application for a rehearing. A decision made after a rehearing which abrogates, changes or modifies the original decision, shall have the same force and effect as the original decision.

STATEMENT OF THE CASE

Petitioner received two unsatisfactory performance evaluations

in her position as Microbiologist I at Kansas State University. She appealed those evaluations before the committee authorized by K.A.R. 1-7-12. The evaluation appeal procedures at Kansas State University allow an attorney to advise the employee but do not allow full representation during the proceedings. In both instances, the committee affirmed that her performance was unsatisfactory. (R. 108-234). Pursuant to K.S.A. 75-2949e(b), respondent Kansas State University proposed that petitioner be dismissed after two unsatisfactory performance evaluations. (R. 243). K.S.A. 75-2949(b) provides that prior to dismissal an employee has an opportunity to reply in writing and in person to the appointing authority on

the issue of the proposed dismissal. Representation by an attorney is allowed if the employee appears in person.

Subsequent to the meeting with the appointing authority, Kansas State University notified petitioner that the dismissal was final. (R. 244). Petitioner appealed the dismissal to the Kansas Civil Service Board.

The Civil Service Board held a full two day due process hearing at which petitioner was represented by counsel. (R. 335-868). After the hearing, the Civil Service Board, pursuant to its authority under K.S.A. 75-2929e(a), found that petitioner's performance was unsatisfactory but, because of her long time employment with the University, the Board

fashioned an order allowing petitioner to accept, within fifteen (15) days, a specific lower level position. (R. 6-A). The Board did not order the University to pay petitioner back pay for the period between her termination and the date on which she would, if she accepted, begin employment in the lower level position. (See entire order set out in petition for writ of certiorari, pages 27-29.)

Petitioner filed a petition for rehearing before the Civil Service Board, but did not include the issue of back pay. The petition for rehearing was denied. (R. 10-A).

Petitioner then appealed the order of the Civil Service Board to the District Court of Shawnee County, arguing that back pay was "implied" by

the Board's order because the Civil Service Board could order only those disciplinary measures authorized by K.S.A. 75-2949(a). (R. 3-A). K.S.A. 75-2949(a), on its face, governs the actions of an "appointing authority," but does not govern the State Civil Service Board.

The District Court of Shawnee County ruled that the issue of back pay was not presented, argued, or considered by the Civil Service Board. The court ruled that K.S.A. 77-612 required petitioner to exhaust all available administrative remedies and that, under K.S.A. 77-617, the court did not have jurisdiction to consider or rule on the new issue of back pay. (Appendix A, page 2). The Kansas Court of Appeals affirmed the ruling

of the District Court, pointing out that K.S.A. 75-2929e(a) gives the Civil Service Board broad discretion and ability to fashion whatever remedy it deems suitable and advisable under the circumstances. The Court of Appeals concluded as follows on this issue: "[I]t is obvious that the issue of back pay was a necessary issue. It was not raised, her administrative remedies were not exhausted with regard to this issue, and the District Court simply had no jurisdiction to consider the issue of back pay." (Appendix B, petition for writ of certiorari). The decision of the Court of Appeals was affirmed by the Kansas Supreme Court. (Appendix A, petition for writ of certiorari).

The portion of petitioner's

statement of the case from page 9 through page 26 has no relevance to the issues she presents to the Court.

SUMMARY OF THE ARGUMENT

The Due Process Clause of the U.S. Constitution does not require that a public employee be allowed full representation of counsel in appeals of job performance ratings which form the basis for termination. Prior to termination, all that is required is notice, an explanation of the employer's evidence, and an opportunity for the employee to present her side of the story.

Where petitioner agrees that she received due process at the hands of the Civil Service Board, she cannot succeed in her assertion that the

Board's resulting order, which did not award back pay, constitutes a denial of due process.

The Kansas courts' refusal to consider the back pay issue was based on their construction of Kansas statutes relating to the authority of the Civil Service Board and the state requirements for judicial review of administrative agency orders. Thus, the Kansas decisions rest on adequate and independent state grounds and are not reviewable by the U.S. Supreme Court.

ARGUMENT

I. PETITIONER WAS NOT CONSTITUTIONALLY ENTITLED TO FULL REPRESENTATION BY COUNSEL IN APPEALS OF HER JOB PERFORMANCE EVALUATIONS.

Petitioner received two unsatisfactory performance

evaluations, both of which she appealed to the committee established pursuant to K.A. R. 1-7-12. At the appeal hearing, petitioner was allowed to have counsel present as an advisor, but counsel was not permitted to speak in behalf of the employee. On the basis of those unsatisfactory evaluations, petitioner was proposed for dismissal. The committee upheld the unsatisfactory evaluations. Prior to dismissal, K.S.A. 75-2949(b) gives the employee an opportunity to reply in writing or in person concerning the proposed action. An employee appearing in person may be represented by an attorney. Subsequent to her reply to the proposed dismissal, petitioner was dismissed on the basis of her two unsatisfactory evaluations.

She then appealed her dismissal to the Kansas Civil Service Board, where she was represented by counsel in a two day hearing. Petitioner alleges no constitutional defects concerning her hearing before the Kansas Civil Service Board.

The Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985) has clearly set out the requirements for a pre-termination hearing where a property interest exists: "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." As the Kansas Court of Appeals determined and the Kansas

Supreme Court affirmed, at the stage in the proceedings at which an employee appeals unsatisfactory performance evaluations, the Constitution does not require full participation by counsel.

II. THE FAILURE OF THE KANSAS CIVIL SERVICE BOARD, AFTER A FULL HEARING, TO ORDER BACK PAY IS NOT A DEPRIVATION OF PROPERTY WITHOUT CONSTITUTIONAL DUE PROCESS.

Petitioner does not fault the due process procedures of the Kansas Civil Service Board. In her petition for certiorari, she states at page 43 that "due process was given." After the due process hearing, the Kansas Civil Service Board framed an order under authority of K.S.A. 75-2929e(a). That statute provides that "the State Civil Service Board within

thirty (30) days after hearing in consideration of the evidence shall affirm, modify or reverse a case on its merits and order any other action it deems appropriate."

Since petitioner asserts that she received due process at the hands of the State Civil Service Board, she cannot succeed in asserting that the resulting order, which failed to award back pay, denied her constitutional due process.

III. THE BACK PAY ISSUE WAS DECIDED BY THE COURTS OF KANSAS ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

The Kansas Civil Service Board found that petitioner was unsatisfactory in her performance, but ordered that she be given fifteen days to accept a specific lower-skilled

position. On the basis of her proposed construction of state statutes petitioner argued before the Kansas courts that back pay should be "implied" by the Board's order. That conclusion rests on petitioner's assertion that K.S.A. 75-2949(a) restricts the Civil Service Board to dismissal, demotion, or suspension of up to thirty (30) days. However, petitioner did not raise that issue before the Civil Service Board. The District Court of Shawnee County stated that "after careful study of the agency record, the court is unable to find any evidence that this issue was presented or argued before the Civil Service Board. Nor is it apparent from the order that the issue of back pay and benefits was

independently considered by the Board." (Appendix A, p. 2). The District Court stated that it was acting in accord with K.S.A. 77-612, which requires exhaustion of administrative remedies, and K.S.A. 77-617, which limits the court to those issues raised before the agency. Id. The Court of Appeals affirmed the District Court on that issue, pointing out, in addition, that K.S.A. 75-2929e(c) allows an aggrieved party to file a motion for rehearing stating the grounds supporting his or her claim that the order is unlawful or unreasonable. However, as the court notes, a subsequent appeal to the District Court is limited to those grounds set forth in that motion. (Appendix B, petition for writ of

certiorari, pp. 26-7). The Court of Appeals concluded:

It was the obligation of Morales to raise all issues which she deemed necessary to present her case to the CSB. It is obvious that the issue of back pay was a necessary issue. It was not raised, her administrative remedies were not exhausted with regard to this issue, and the District Court simply had no jurisdiction to consider the issue of back pay. (Appendix A, petition for writ of certiorari, p. 30).

Thereafter, the Kansas Supreme Court adopted the unpublished opinion of the Court of Appeals, affirming the trial court on the issue of back pay. (Appendix A, petition for writ of certiorari). There is no suggestion in any of the three decisions of the Kansas courts that this decision was based on federal constitutional grounds.

The United States Supreme

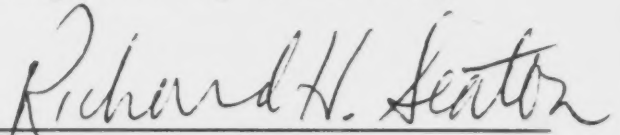
Court long has held that it "will not consider an issue of federal law on direct review from a judgment of state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." Harris v. Reed, 489 U.S. 1038 at 1041-42 (1989). The court goes on to add that this doctrine applies to procedural as well as substantive state law. Id. Because the decisions of the state courts on the back pay issue rest entirely on state-law grounds, that issue should not be considered by the U.S. Supreme Court.

CONCLUSION

For the foregoing reasons,

respondents Kansas State University
and the Kansas Board of Regents
respectfully request that the petition
for writ of certiorari be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Richard H. Seaton". The signature is written in dark ink and is positioned above a horizontal line.

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IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION EIGHT

LOIS MORALES,

Plaintiff,

vs.

Case No.
88-CV-13

KANSAS BOARD OF REGENTS
and KANSAS STATE
UNIVERSITY,

Defendants.

MEMORANDUM DECISION AND ORDER

This case appears before the Court on plaintiff's Petition for Review of an Order of the Civil Service Board of the State of Kansas.

All orders of the Civil Service Board are subject to judicial review under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions. K.S.A. 77-601 et seq. However, the scope of such review must remain with the guidelines set in K.S.A. 77-621(c). Absent a finding of

one or more of the following, the Court is without authority to remand, modify or reverse an agency order:

(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;

(2) the agency has acted beyond the jurisdiction conferred by any provision of law;

(3) the agency has not decided an issue requiring resolution;

(4) the agency has erroneously interpreted or applied the law;

(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is

otherwise unreasonable, arbitrary or capricious.

The Court, after having fully considered the contents of the file, transcript of the record, and after having made an independent determination, finds that the decision of the Civil Service Board of the State of Kansas dated November 17, 1987, should be and hereby is adopted by the Court. The Civil Service Board acted properly within its authority and jurisdiction. K.S.A. 75-2925 *et seq.* It is, therefore, considered, ordered and adjudged that the findings of the Civil Service Board be affirmed by the Court.

The Court now considers the issue of back pay. In the petitioner's Motion for Leave to Amend, the Court is urged to imply an agency ruling granting the petitioner back pay and

benefits. After careful study of the agency record the Court is unable to find any evidence that this issue was presented or argued before the Civil Service Board. Nor is it apparent from the Order that the issue of back pay and benefits was independently considered by the Board.

Prior to judicial review of agency actions, a petitioner must exhaust all available administrative remedies. K.S.A. 77-612. Further, the Court is without jurisdiction to consider or rule upon such new issues. K.S.A. 77-671.

The petitioner is not left without opportunity to seek remedy and may still bring her remaining grievance before the Civil Service Board. However, the Court does take note of the possible ex parte

